

**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF UTAH**

COMPLAINANT:

UTAH INSURANCE DEPARTMENT

RESPONDENT:

ATTORNEYS TITLE GUARANTY FUND, INC.
999 18th Street, Suite 1101
P. O. Box 869
Denver, Colorado 80201

Utah Org. Id. No. 1718.

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2002-155-EX

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER concerning whether Respondent's foreign insurer certificate of authority should be suspended came on to be heard before the Commissioner of the Utah Insurance Department ("*Department*") on Wednesday, September 24th, 2003 at 8:30 o'clock A. M. Mountain Time, with Mark E. Kleinfield, Administrative Law Judge, serving as designated *Presiding Officer*.

Said hearing being held at the Department's offices located at the Utah State Office Building, Room 3110, Salt Lake City, Utah 84114, having been convened at the designated time of 8:30 A. M., September 24th, 2003 and adjourned at 6:15 P. M. on said same day.

Appearances:

M. Gale Lemmon, Assistant Attorney General, State of Utah, *Attorney for Complainant*, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

Frederick B. Skillern, Montgomery, Little & McGrew, *Attorney for Respondent*, 5445 DTC Parkway, Greenwood Village, Colorado 80111.¹

¹ Mr. Skillern being admitted *pro haec vice* upon the motion of Bruce A. Maak, Parr, Waddoups, Brown, Gee & Loveless, 185 South State Street, Suite 1300, P. O. Box 11019, Salt Lake City, Utah 84147.

By the Presiding Officer:

Pursuant to a September 8th, 2003 *Notice of Continuance of Hearing* a hearing was conducted on September 24th, 2003 in the above-entitled proceeding. The Respondent was present at that time.

The hearing was convened and conducted as a **formal hearing** in accordance with Utah Code Ann. Sections 63-46b-6, 63-46b-7, 63-46b-8, 63-46b-9 and 63-46b-10 and Administrative Rule R590-160-6.

ISSUE, BURDEN and "STANDARD OF PROOF"

1. The basic issue(s) in this case is (are):

a. Is Respondent in an alleged state of either “*insolvency*”² or “*financial hazardousness*” such that the “*further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors, or the public*”³; and:

(1) thus if a domestic insurer, grounds would exist for delinquency proceedings against Respondent under Chapter 27 of the Utah Insurance Code, pursuant to Section 31A-14-217, UCA, 1953, as amended; and

(2) as such whenever there would be grounds for delinquency proceedings under Chapter 27 of the Utah Insurance Code against Respondent as a foreign insurer, if the Respondent as a foreign insurer were a domestic insurer, the commissioner may suspend the foreign insurer’s (Respondent’s) certificate of authority?; and

b. If so, is suspension of the Respondent’s foreign certificate of authority the appropriate action to be taken by the Department?

(SEE also Paragraph 2 under DISCUSSION-ANALYSIS.)

2. The “*burden of proof*” or “*burden of going forward*” in this case as to the above issue(s) is on the Complainant-Department.

3. As per Utah Administrative Code Rule, R590-160-5(10) as to the above and foregoing “issue(s)” or “question(s)” to be answered the “*standard of proof*” as to issues of fact is to be proven by a “*preponderance of the evidence*”.

Both parties presented opening statements.

Thereafter, evidence was offered and received.

² SEE Subsection 31A-27-307(2), Utah Code Ann., 1953, as amended. SEE also Subsection 31A-1-301(77), Utah Code Ann., 1953, as amended.

³ SEE Subsection 31A-27-307(3), Utah Code Ann., 1953, as amended.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Complainant Department:

1. Eric Showgren, *Financial Analyst-Examiner*, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.
2. Steve Fry⁴, *Chief Financial Examiner*, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

For the Respondent:

1. Christopher J. Condie, *President and Chief Executive Officer*, Attorneys Title Guaranty Fund, 999 18th Street, Suite 1101, Denver, Colorado 80202.

All of whom were sworn and testified.

Exhibits:

The Complainant Department offered the following exhibits:

1. **Complainant's Exhibit No. "1"**, consisting of thirty-seven (37) type written or printed pages, being a copy of March 10, 2003 "*Report of Association Financial Examination as of December 31, 2001 – Attorneys Title Guaranty Fund, Inc.*" conducted by Division of Insurance, State of Colorado.
2. **Complainant's Exhibit No. "2"**, consisting of three (3) type written or printed pages, being a copy of a "*Determination of Delinquency*" dated June 25th, 2003 entered by Douglas Dean, (Colorado) Commissioner of Insurance, in a certain matter entitled "*In the Matter of Attorneys Title Guaranty Fund, Inc., a Colorado insurance corporation, Respondent*", Proceeding No. O-03-347, before the Division of Insurance, State of Colorado.
3. **Complainant's Exhibit No. "3"**, consisting of twenty-seven (27) type written or printed pages, being a copy of the *Quarterly Statement* of the Attorneys Title Guaranty Fund, Inc., Denver Colorado, for the quarter ended June 30, 2003, filed with the Insurance Department of the State of Colorado (**NOTE**: Shows a file date stamp of August 18, 2003 with the Utah State Insurance Department).

⁴ Mr. Fry also served as a rebuttal witness for the Department.

4. **Complainant's Exhibit No. "4"**, consisting of five (5) type written or printed pages, being a copy of a State of Utah Insurance Department *Desk Audit Worksheet* conducted by Eric Showgren, dated June 30, 2003.

5. **Complainant's Exhibit No. "6"**, consisting of four (4) type written or printed pages, being a copy of a July 9, 2003 letter from Chad H. Collier, Chief Insurance Examiner, Division of Insurance, State of Colorado, to Christopher J. Condie, President, Attorneys Title Guaranty Fund, Inc., Denver, Colorado 80202.

6. **Complainant's Exhibit No. "9"**, consisting of two (2) type written or printed pages, being a copy of *Statement of Assets*, Attorneys Title Guaranty Fund, Inc., dated July 31, 2003.

7. **Complainant's Exhibit No. "10"**, consisting of five (5) type written or printed pages, being a copy of a State of Utah Insurance Department *Desk Audit Worksheet* conducted by Eric Showgren, dated July 31, 2003.

8. **Complainant's Exhibit No. "12"**, consisting of three (3) type written or printed pages, being a copy of a July 30, 2003 letter from Chad H. Collier, Chief Insurance Examiner, Division of Insurance, State of Colorado, to Christopher J. Condie, President, Attorneys Title Guaranty Fund, Inc., Denver, Colorado 80202.

(No objection being made, except as to Exhibit No.s 4, 6, 10 and 12, which were admitted and entered over said objections, all of which were accepted and entered.)

The Respondent offered the following exhibits:

1. **Respondent's Exhibit No. "A"**, consisting of one (1) page of typed and or printed materials, being a copy of Section 10-11-111, Colorado Revised Statutes, 1963.

2. **Respondent's Exhibit No. "B"**, consisting of one (1) page of typed and or printed materials, being a copy of *ATGF Capital and Surplus Analysis* (as of June 30, 2003 with "adjustments").

3. **Respondent's Exhibit No. "C"**, consisting of one (1) page of typed and or printed materials, being a copy of a cancelled \$53,073.34, dated June 27, 2003, checks number 42844, from Attorneys' Title Insurance Fund, Inc., to Attorneys Title Guaranty Inc..

4. **Respondent's Exhibit No. "D"**, consisting of five (5) pages of typed and or printed materials, being a copy of check register entries of Attorneys Title Guaranty Fund, Inc., August 1999 to June 2003 ("*Defalcation Several Properties*").

5. **Respondent's Exhibit No. "E"**, consisting of eight (8) pages of typed and or printed materials, being a copy of check register entries of Attorneys Title Guaranty Fund, Inc., April 2001 to June 2003 ("*Bryan Robinson Defalcation*").

6. **Respondent's Exhibit No. "F"**, consisting of two (2) pages of typed and or printed materials, being a copy of a July 15, 2003 "*Memorandum*" from Brian A. Coleman to Chris Condie, and the front side of a July 15, 2003 check in the amount of \$1,069,000.00, check number UNNUMBERED, from Advantage Property Management, LC, to Attorneys Title Guaranty Fund, Inc..

7. **Respondent's Exhibit No. "G"**, consisting of two (2) pages of typed and or printed materials, being a copy of a September 17, 2003 letter from Stephen C. Tingey, Ray, Quinney & Nebeker, Salt Lake City, Utah to Robert A. Cohen, Cohen & Fox, P. A., Miami, Florida.

8. **Respondent's Exhibit No. "H"**, consisting of one (1) page of typed and or printed materials, being a copy of a September 19, 2003 letter from Perrin R. Love, Clyde, Snow, Sessions & Swenson, Salt Lake City, Utah to Thomas J. Erbin, Prince, Yeates & Geldzahler, Salt Lake City, Utah.

9. **Respondent's Exhibit No. "I"**, consisting of one (1) page of typed and or printed materials, being a copy of a "*memorandum*" facsimilie, dated September 23, 2003 from Rebekah Rathis, Claims Specialist, TIG Specialty, to Brian Coleman, ATGF.

10. **Respondent's Exhibit No. "J"**, consisting of eight (8) pages of typed and or printed materials, being a copy of check register entries of Attorneys Title Guaranty Fund, Inc., June 2001 to June 2003 ("*Clay Harrison Defalcation*").

(No objection being made, except as to Exhibit No.s B, D, G, H and I, which were admitted and entered over said objections, all of which were accepted and entered.)

Argument followed.⁵

The Presiding Officer being fully advised in the premises and taking administrative notice of the files and records of the Department, now enters his *Findings of Fact, Conclusions of Law, and Order*, on behalf of the Department:

⁵ The Court permitted the record to remain open until the close of business October 10th, 2003 for the filing of simultaneous memorandum on the "*definition*" of "*financial hazardous condition*". The Department filed a memorandum. The Respondent did not file a memorandum.

FINDINGS OF FACT

I, find by a preponderance of the evidence, the following facts:

Preliminary-Procedural Facts

(Paragraphs 1-6)

1. The Utah Insurance Department (“*Department*”) is a governmental entity of the State of Utah. The Department as per Utah Code Ann. Section 31A-2-101 is empowered to administer the *Insurance Code*, Title 31A, Utah Code Ann., 1953, as amended.

2. The Respondent, Attorneys Title Guaranty Fund, Inc., is:

a. an apparent Colorado corporation, domiciled in and maintaining a present principal business address of 999 18th Street, Suite 1101, P. O. Box 869, Denver, Colorado 80201;

b. an apparent foreign business corporation authorized to conduct business in the State of Utah;

c. a “*foreign insurer*” as defined by Utah Code Ann. Section 31A-1-301(61), UCA, 1953, as amended; and

d. the holder of certificate of authority and or *Utah Org. Id No. 1718*, having obtained and maintained such continuously since on or about October 11th, 1960.

3. The Department on or about September 9th, 2002 issued a “*Notice of Informal Adjudicative Proceeding and Order*”, being Docket No. 2002-155-EX, to the Respondent, suspending the Respondent’s foreign insurer certificate of authority. A copy of said Notice and Order being mailed to the Respondent at its referenced business address on or about September 9th, 2002.

4. The Respondent filed its “*answer*” and a “request for hearing” under date of September 16th, 2002 with the Department on September 20th, 2002.

5. Said matter was converted to a formal proceeding via a “*Notice of Conversion to Formal Proceeding and Notice of Hearing*”⁶ entered under date of September 20th, 2002.

6. a. That based on the preliminary facts as set forth in paragraphs 1 through 5, immediately above, through means of the referenced September 20th, 2002 “*Notice of Conversion to Proceeding and Notice of Hearing*”, mailed to the Respondent at its referenced business address on September 20th, 2002 a formal hearing was scheduled for October 3rd, 2002 at 9:00 A. M..

⁶ In accordance with Administrative Rule R590-160-4(3) *sua sponte* the proceeding was converted from an informal to a formal proceeding.

b. Based on a series of intervening motions for continuance and orders granting the same several continuances extending the October 3rd, 2002 hearing date were entered.

c. (1) The Complainant-Department filed its *Request for Hearing Date* on August 21st, 2003.

(2) A *Notice of Hearing* under date of August 21st, 2003 was mailed to the Respondent at its referenced business address on August 21st, 2003 setting a formal hearing date for September 18th, 2003 at 9:00 A. M..

d. Based on a September 8th, 2003 *Notice of Continuance of Hearing*, based on joint oral motion of the parties due to conflicts, mailed to the Respondent or its legal counsel at its (his) referenced business address on September 8th, 2003 the instant formal hearing was scheduled for September 24th, 2003 at 8:30 A. M..

Operative Facts
(Paragraphs 7 -9)

7. a. The Department in or about late 2001 and early 2002 became aware of numerous alleged defalcations and other irregularities occurring in the State of Utah resultant as of the actions of several agents of the Respondent.⁷

b. The Department apparently was aware of audits and investigations being conducted by the Division of Insurance, State of Colorado, Respondent's state of domestication, as regards the Respondent also.

c. The Department based on such awareness apparently greatly scrutinized the Respondent's annual report to the Department for the year ending December 31, 2001 amongst other financial reports.

d. The Department further apparently based on such analysis of Respondent's January 1 through December 31st, 2001 report and receipt of further reports and documentation from the Division of Insurance, State of Colorado particularly the March 10, 2003 "*Report of Association Financial Examination as of December 31, 2001 – Attorneys Title Guaranty Fund, Inc.*" (Complainant's Exhibit No. "1") conducted and compiled two (2) "*desk audits*" as regards Respondent under date of June 30, 2003 (Complainant's Exhibit No. "4") and July 31, 2003 (Complainant's Exhibit No. "10").

⁷ **SEE** Respondent's Exhibit No.s "D", "E" and "J" in this regards. **NOTE:** Respondent for the limited purposes of the present proceeding apparently acknowledging that such defalcations occurred. The Respondent for purposes of numerous pending pieces of litigation attempting to resolve and or settle the same. Respondent though taking the apparent legal position denying any agent-*respondeat superior* responsibility. The Department placing a great amount of stock in the Respondent's alleged failure to provide "*reserves*" to provide for litigation expenses in this regards as a major point of the Department's analysis as to insolvency and "*hazardous financial condition*".

8. The Division of Insurance, State of Colorado on June 25, 2003 entered a “*Determination of Delinquency*” in a certain matter entitled “*In the Matter of Attorneys Title Guaranty Fund, Inc., a Colorado insurance corporation, Respondent*”, Proceeding No. O-03-347, before the Division of Insurance, State of Colorado (Complainant’s Exhibit No. “2”).

9. a. The Respondent in response to both the Division of Insurance, State of Colorado’s actions and the Department’s instant action has reviewed and recalculated its past several annual and quarterly accounting periods as to numerous aspects of its (Respondent’s) statutory reports and or responded to the referenced audits conducted by both states’ agencies.

b. The Respondent particularly in regards to settlement actions concerning the alleged defalcations has had apparent infusions of cash and settled several pieces of the pending litigation. (SEE Respondent’s Exhibit No.s “B”, “C” and “F”).

c. The Respondent also apparently specifically responding to the Division of Insurance, State of Colorado’s July 9th, 2003 and earlier correspondence in an effort of remedial action to the circumstances pointed out by the State of Colorado. (SEE Complainant Exhibit No.s “6” and “12” referencing history of remedial efforts).

DISCUSSION-ANALYSIS

(Paragraphs 1 -14)

1. a. Both the Respondent and the Department in large measure while advocating clearly different characterizations or interpretations of the above referenced operative facts in substance concurred as to the basic *chronology* and core facts.

b. The record now being complete sets forth competent and credible evidence for the entry of the following analysis.

2. The question(s) presented is:

a. (1)(A) Whether Respondent is in an alleged state of either “*insolvency*” or “*financial hazardousness*” such that the “*further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors, or the public*”; and

(B) thus if a domestic insurer, grounds would exist for delinquency proceeding against Respondent under Chapter 27 of the Utah Insurance Code; and

(2) “Whether the Respondent’s actions thus “invoke” Section 31A-14-217, UCA, 1953, as amended, wherein whenever there would be grounds for delinquency proceedings under Chapter 27 of the Utah Insurance Code against a foreign insurer, if the foreign insurer were a domestic insurer, the commissioner may suspend the foreign insurer’s certificate of authority?, and;

b. “If the Respondent comes within the purview of said cited statutory section is suspension of Respondent’s certificate of authority the appropriate penalty to be imposed”; and

c. Whether as per Utah Administrative Code Rule, R590-160-5(10) as to each of the above and foregoing “issue(s)” or “question(s)” to be answered the “*standard of proof*” as to issues of fact have been proven by a “*preponderance of the evidence*”?

3. Applicable Pertinent Statutes and Administrative Rules are as follows (although others may be otherwise specifically cited within the body of this “*Order on Hearing*”):

a. Section **31A-14-217** states:

“31A-14-217. Revocation of certificate of authority.

Whenever there would be grounds for delinquency proceedings under Chapter 27 against a foreign insurer, if the foreign insurer were a domestic insurer, the commissioner may, after any proceeding authorized by Title 63, Chapter 46b, Administrative Procedures Act, revoke, suspend, or limit the foreign insurer's certificate of authority. This action does not affect insurance which has already been issued. The insurer remains subject to regulation until released under Section 31A-14-216.”

b. Subsection **31A-27-102(1)(e)** states:

“(1)As used in this chapter:

(a) ****

(e) “**Delinquency proceeding**” means any:

(i) proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer; and

(ii) summary proceeding under Sections 31A-27-201 through 31A-27-203.”

(EMPHASIS ADDED).

c. Subsection **31A-27-301(1)** states:

“31A-27-301. Grounds for rehabilitation.

The commissioner may apply by verified petition to the Third District Court for Salt Lake County or to the district court in the county in which the principal office of the insurer is located, for an order directing the rehabilitation of a domestic insurer or an alien insurer domiciled in this state on any one or more of the following grounds:

(1) any of the grounds on which the commissioner may apply for an order of liquidation under Section 31A-27-307, whenever he reasonably believes that the insurer

may be successfully rehabilitated without substantial increase in the risk of loss to the insurer's policyholders or creditors, or to the public;

(12)”

(EMPHASIS ADDED).

d. Section **31A-27-307** states:

“31A-27-307. Grounds for liquidation.

The commissioner may apply by verified petition to the Third District Court for Salt Lake County or to the district court of the county in which the principal office of the insurer is located, for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this state on any of the following grounds:

(1) any ground on which the commissioner may apply for an order of rehabilitation under Section 31A-27-301, whenever the commissioner believes that attempts to rehabilitate the insurer would:

(a) substantially increase the risk of loss to:

(i) its creditors;

(ii) its policyholders; or

(iii) the public; or

(b) be futile, or that rehabilitation would serve no useful purpose;

(2) that the insurer is insolvent or is about to become insolvent as defined in Section 31A-1-301;

(3) that the insurer is in the condition that the further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors, or the public, including the occurrence of an authorized control level event as defined in Section 31A-17-605;

(4) that the insurer:

(a) during the previous 12 months:

(i) has not transacted the business of insurance;

(ii) has transacted only a token insurance business although authorized to do so throughout that period; or

(b) more than 12 months after incorporation, has failed to become authorized to do an insurance business;

(5) that during the previous 12 months, the insurer has systematically attempted to compromise with its creditors or renegotiate previously agreed settlements on the ground that it is financially unable to pay its claims in full;

(6) that the insurer has commenced, or within the previous year has attempted to commence, voluntary liquidation otherwise than under this title;

(7) that the insurer has concealed records or assets from the commissioner or improperly removed them from the jurisdiction;

- (8) that the insurer does not satisfy the requirements that would be applicable if it were seeking initial authorization to do an insurance business in this state, except for:
- (a) requirements that are intended to apply only at the time the initial authorization to do business is obtained and not after that time; and
 - (b) requirements that are expressly made inapplicable by the laws establishing the requirements;
- (9) that the holders of 2/3 of the shares entitled to vote, or 2/3 of the members or policyholders entitled to vote in an insurer controlled by its members or policyholders, have consented to the petition; or
- (10) the conditions of Subsection 31A-1-106(7) are present.”

(EMPHASIS ADDED).

e. Section **31A-17-605** states:

“31A-17-605. Authorized control level event.

- (1) "Authorized control level event" means any of the following events:
- (a) the filing of an RBC report by the insurer or health organization that indicates that the insurer's or health organization's total adjusted capital is greater than or equal to its mandatory control level RBC but less than its authorized control level RBC;
 - (b) the notification by the commissioner to the insurer or health organization of an adjusted RBC report that indicates the event in Subsection (1)(a), provided the insurer or health organization does not challenge the adjusted RBC report under Section 31A-17-607;
 - (c) if, pursuant to Section 31A-17-607, the insurer or health organization challenges an adjusted RBC report that indicates the event in Subsection (1)(a), notification by the commissioner to the insurer or health organization that after a hearing the commissioner rejects the insurer's or health organization's challenge;
 - (d) the failure of the insurer or health organization to respond, in a manner satisfactory to the commissioner, to a corrective order, provided the insurer or health organization has not challenged the corrective order under Section 31A-17-607; or
 - (e) if the insurer or health organization has challenged a corrective order under Section 31A-17-607 and the commissioner after a hearing rejects the challenge or modifies the corrective order, the failure of the insurer or health organization to respond, in a manner satisfactory to the commissioner, to the corrective order subsequent to rejection or modification by the commissioner.
- (2) (a) In the event of an authorized control level event with respect to an insurer or health organization, the commissioner shall:
- (i) take any action required under Section 31A-17-604 regarding an insurer or health organization with respect to which a regulatory action level event has occurred; or
 - (ii) take any action as is necessary to cause the insurer or health organization to be placed under regulatory control under Section 31A-27-201 if the commissioner considers it to be in the best interests of:
 - (A) the policyholders or members;
 - (B) creditors of the insurer or health organization; and

(C) the public.

(b) In the event the commissioner takes an action described in Subsection (2)(a), the authorized control level event is sufficient grounds for the commissioner to take action under Section 31A-27-201, and the commissioner shall have the rights, powers, and duties with respect to the insurer or health organization set forth in Section 31A-27-201.

(c) If the commissioner takes an action under Subsection (2)(a) pursuant to an adjusted RBC report, the insurer or health organization is entitled to the protections afforded to an insurer or health organization under Section 31A-27-203 pertaining to summary proceedings.”

f. Subsection **31A-1-301(77)** states:

“As used in this title, unless otherwise specified:

(1) ****

(77) "**Insolvency**" means that:

(a) an insurer is unable to pay its debts or meet its obligations as they mature;

(b) an insurer's total adjusted capital is less than the insurer's mandatory control level RBC under Subsection 31A-17-601(8)(c); **or**

(c) an insurer is determined to be **hazardous** under this title.”

(EMPHASIS ADDED).

4. a. The Department sees the recent and present circumstances of Respondent as one of “*financial hazardousness*”. The Department pictures or envisions a company, if not presently unable to meet its bills, one which based on an apparent *morass* of pending litigation⁸ has not adequately reserved for legal defense costs and possible future damages payments.

b. The Respondent on the other hand views or sees the Department’s actions somewhat akin to Shakespeare’s *Claudio* and *Hero* and “*much ado about nothing*”⁹.

c. The Court in analyzing the plethora of paper and number crunching done by both sides sees the circumstances somewhere slightly one side of the middle

--- fast approaching the picture envisioned by the Department.

5. a. The Department has alleged in substance that the Respondent is either insolvent or in a “*financially hazardous*” condition. The latter in reality being one “*subset*” of three of the former as per Subsection 31A-1-301(77).

⁸ In fact 1 plaintiffs’ attorney, Mr. Scott Sabey, and 1 legal counsel for an apparent competitor of Respondent, Mr. R. Peter Stevens, briefly attended part of the September 24th, 2003 public hearing as members of the public.

⁹ “*Much Ado About Nothing*”, William Shakespeare, 1600.

b. Subsection 31A-1-301(77) sets forth three (3) means by which insolvency may be determined:

(1) “an insurer is unable to pay its debts or meet its obligations as they mature”;

(2) “an insurer's total adjusted capital is less than the insurer's mandatory control level RBC under Subsection 31A-17-601(8)(c)”;

(3) “an insurer is determined to be hazardous under this title”.

6. First, while *allusions* to such or the potentiality of such were made the Court was not presented with any real evidence that the Respondent was not paying its bills or meeting its day to day operating expenses or other obligations as they mature.

7. a. As to the second criterion, the risk based capital or RBC computation of Respondent's total adjusted capital, such may be said to equate to “*accountant job security*” for its determination takes a legion of number crunching.

b. (1) The Department says its analysis shows that the Respondent's total adjusted capital is less than the insurer's mandatory control level.

(2) The Respondent says contrary.

(3) Such in essence becoming a “*he said, (s)he said*” dialogue.

c. (1) The Court while being able to balance its own personal checkbook has to in the present instance defer to the expertise of the Department and Department staff. While a detailed page by detailing of each and every step was not presented *per se* the testimony of Mr. Showgren and Mr. Fry was reasonably clear that Respondent's present financial circumstances were in their mind at a level insufficient to meet the requisite RBC requirements.

(2) The Respondent took issue with such through means of recalculated analysis of its most recent quarterly statement.

(3) As stated the Court must defer based on the Department's expertise and background in dealing with RBC issues on a daily basis. The imposition of delinquency proceedings against the Respondent if a domestic insurer would seem justified based on the RBC criterion alone.

8. a. *Notwithstanding* the RBC criterion and even discounting such the Court feels the real case made for delinquency proceedings if Respondent were a domestic insurer is anchored under the third criterion under Subsection 31A-1-301(77) --- “an insurer is determined to be hazardous under this title (31A)”.

b. The Court gets the impression that the Respondent runs its business “*fast and loose*”. The Respondent when faced with hard numbers by both the State of Colorado and the State of Utah basically saying “*Oh, no, 2 plus 2 does not equal 4*”. “*It equals 3 or 4 and three-quarters*” or what ever is necessary to make the balance worksheet balance.

c. The Court is exceedingly and especially **greatly** concerned when it looks at the Respondent’s own exhibits, namely Exhibit No.s “D”, “E” and “J” which it will label collectively as “*the defalcations*”. By review of the same it appears **over \$13,500,000** as being paid out (\$3,724,742.26 “Several Properties/ \$5,639,239.78 “Bryan Robinson/\$4,296,055.19 “Clay Harrison”). *Notwithstanding* taking Respondent’s “*total ending reserves*” are in the positive for each exhibit the Court is **aghast** at the inferential lack of oversight by the Respondent that over 13 and one-half million dollars of defalcations took place on and under Respondent’s “*watch*”.

9.a. The present proceeding is not though just about the referenced defalcations. The defalcations just being an arguably extreme example of an underlying attitude and approach.

b. The present proceeding is in essence about whether delinquency proceedings could be instituted against the Respondent if it were a domestic insurer.

c. To the Court’s mind when looking at all the evidence *cumulatively* it has been more than adequately shown that the Respondent is:

(1) “an insurer [is] determined to be hazardous under this title[.]”; and

(2) that if a domestic insurer grounds for the instituting of delinquency proceedings exist as regards the Respondent.

10. The Respondent’s past and present actions and approach not only place(d) the Respondent in a financially hazardous position, but are hazardous in and of them self in that as per Subsection 31A-27-307(3) “the insurer is in the condition that the further transaction of business **would be hazardous**, financially or otherwise, to its policyholders, its creditors, or the public,” (EMPHASIS ADDED).

11. The question now turns to what is the appropriate action to be taken by the Department.

12. The Commissioner’s action upon a finding that delinquency proceedings could be instituted is permissive not mandatory. The Commissioner may “*revoke, suspend, or limit the foreign insurer’s certificate of authority*”. It would appear reasonably clear that revocation is inappropriate. Such leaves suspension or “*limitation*”.

13. Respondent makes much of the fact that the determination of delinquency in Colorado, Respondent's "*home*" state, has lead to only a current order of direct supervision.

14. a. What the State of Colorado does or does not do to a member of its domestic insurer population while as here clearly of impact is not controlling.

b.(1) The Commissioner is charged with overseeing the insurance industry in **Utah**, not Colorado.

(2) Another primary charge of the Commissioner is protecting Utah consumers.

c. (1) Respondent feels it can clean its own house or rather its own house is not dirty.¹⁰

(2) Anything short of suspension in attempting to "limit" the Respondent while it puts its house in order (with Department supervision) would in the Court's mind take an *exorbitant* and disproportionate amount of Department man and woman hours.

d.(1) The most workable mechanism would be to suspend the Respondent *post haste* and work forward in cleaning up the house.

(2) One cannot sweep out the front parlor while dust is blowing in through the kitchen backdoor.

BASED ON THE ABOVE AND FOREGOING FINDINGS OF FACT and discussion-analysis the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. If Respondent were a domestic insurer, grounds would exist for delinquency proceedings against it under Chapter 27 of the Utah Insurance Code.

2. Pursuant to Section 31A-14-217, Utah Code Ann., 1953 as amended, whenever there would be grounds for delinquency proceedings under Chapter 27 of the Utah

¹⁰ Respondent's view may well come from it being too close to the situation and not being able to "*see the forest through the trees*" or possibly from a dis-jointed version of the three ancient monkeys, *Mizaru*, *Kikazaru* and *Iwazaru*, who neither saw, heard nor spoke evil (dirt).

Insurance Code against a foreign insurer, if the foreign insurer were a domestic insurer, the commissioner may suspend the foreign insurer's certificate of authority.

3. The Respondent's foreign insurer certificate of authority (Utah Org. Id. No. 1718) should be suspended and should remain suspended for a period of 12 months from the date of this Order or until Respondent has demonstrated to the satisfaction of the commissioner that it has complied with all statutes and regulations of the State of Utah, whichever is less.

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW the Presiding Officer enters the following:

ORDER

WHEREFORE, IT IS ORDERED that:

1. As per Section 31A-14-217, Utah Code Ann., 1953, as amended, there being grounds for delinquency proceedings under Chapter 27 against the Respondent, a foreign insurer, if the Respondent were a domestic insurer:

a. The Respondent's Utah foreign insurer Certificate of Authority (Utah Org. Id. No. 1718) is hereby suspended upon entry of this present Order;

b. During the period of suspension, Respondent shall not write, sell, place, or renew any insurance business in the State of Utah, or for residents of the State of Utah or covering risks in the State of Utah, including accepting of reinsurance;

c. During the period of suspension of Respondent's foreign insurer Certificate of Authority (Utah Org. Id. No. 1718), Respondent may service existing policies insuring Utah residents or covering risks in the State of Utah.

2. The Respondent remains under the jurisdiction of the Utah Insurance Commissioner until released from regulation pursuant to the requirements of the Utah Insurance Code.

3. That during the period of suspension of Respondent's foreign insurer Certificate of Authority (Utah Org. Id. No. 1718), Respondent shall continue to file its Annual Statement and other annual filings and pay its annual fees.

4. The Respondent's foreign insurer Certificate of Authority (Utah Org. Id. No. 1718) shall remain suspended for a period of 12 months from the date of entry of this Order or until Respondent has demonstrated to the satisfaction of the commissioner that it has complied with all statutes and regulations of the State of Utah, whichever is less.

DATED and ENTERED this 14th day of October, 2003.

**MERWIN U. STEWART,
INSURANCE COMMISSIONER**



/s/ Mark E. Kleinfeld
MARK E. KLEINFELD, J. D.
ADMINISTRATIVE LAW JUDGE and
PRESIDING OFFICER
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114
Telephone: (801) 537-9246
Facsimile: (801) 538-3829
Email: MKleinfeld@utah.gov

ADMINISTRATIVE AGENCY REVIEW

Administrative Agency Review of this Order may be obtained by filing a Petition for Review with the Commissioner of the Utah Insurance Department within thirty (30) days of the date of entry of said Order consistent with Utah Code Ann. Section 63-46b-12 and Administrative Rule R590-160-8.

Failure to seek agency review shall be considered a failure to exhaust administrative remedies.

(R590-160-8 and Section 63-46b-14)

JUDICIAL REVIEW

As an “**Formal Hearing**” after agency review judicial review of this Order may be obtained by filing a petition for such review consistent with Utah Code Ann. Section 63-46b-16.

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of October, 2003 a true and correct copy of the above and foregoing ***ORDER ON HEARING (Formal Hearing)*** was sent first class mail, postage prepaid to the following:

Frederick B. Skillern
Montgomery, Little & McGrew
5445 DTC Parkway
Greenwood Village, Colorado 80111

and

Bruce A. Maak
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147

and a true and correct copy hand-delivered to the following:

M. Gale Lemmon
Assistant Attorney General
State of Utah
Attorney for Complainant
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114

/s/ Mark E. Kleinfield

ADMINH..AttysTitle.Formal.dec.10-14-03